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SUPREME COURT, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-602

HARSH BUILDING CO., an Oregon corporation;
HARSH INVESTMENT CORP., an Oregon corporation;
HAROLD J. SCHNITZER;
and HAROLD B. HUTCHINSON,
Petitioners,

v.

SAM BIALAC; JERRY BIALAC;
JAMES T. BIALAC; LEE BIALAC;
ALICE SUE ALTMAN; PARK LEE ENTERPRISES, INC.,
an Arizona corporation; and
RENTAL DEVELOPMENT CORPORATION
OF AMERICA, an Arizona corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUBJECT INDEX

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	
1. The Court of Appeals' Abrupt Remand Order Has Denied to Petitioners Their Valuable Due Process Rights to be Heard and Present Evidence as to the Principal Place of Business of HBC	8
2. The Court of Appeals' Decision Conflicts With Rulings of This Court and Other Courts of Appeals and Ignores the Effect of a Binding Factual Stipulation Which Properly Established the Basis for Federal Jurisdiction Over the Controversy Below	12
3. The Court of Appeals' Summary Application of the "Place of Operations" Test Raises Significant Questions as to the Proper Criteria by Which Lower Federal Courts Should Locate a Corporation's Principal Place of Business for Purposes of 28 U.S.C. §1332 (c)	15
CONCLUSION	19
APPENDIX	
Opinion of the United States Court of Appeals for the Ninth Circuit	A-1

Page

Order denying rehearing and rejecting suggestion of appropriateness of rehearing *en banc* . . A-3

AUTHORITIES CITED

Cases:

Aetna Cas. & Sur. Co. v. Flowers,
330 U.S. 464 (1947) 2

American Fire & Cas. Co. v. Finn,
341 U.S. 6 (1951) 13

Arnold v. Troccoli,
344 F.2d 842 (2d Cir. 1965) 10

Bialac v. Harsh Bldg. Co.,
436 F.2d 1381 (9th Cir. 1971) 5

Boddie v. Connecticut,
401 U.S. 371 (1971) 9

Brown v. Eastern States Corp.,
181 F.2d 26 (4th Cir. 1950) 10

Caffery v. New York Cent. R.R.,
324 F.2d 711 (2d Cir. 1963) 10

Danos v. Waterford Oil Co.,
351 F.2d 940 (5th Cir. 1965) 18

De La Maza v. United States,
215 F.2d 138 (9th Cir. 1954) 14, 15

Di Frischia v. New York Cent. R.R.,
279 F.2d 141 (3d Cir. 1960) 14, 16

Egan v. American Airlines, Inc.,
324 F.2d 565 (2d Cir. 1963) 10

Gay v. Ruff,
292 U.S. 25 (1934) 2

Page

George v. Douglas Aircraft Co.,
322 F.2d 73 (2d Cir. 1964) 10

Goldberg v. Kelly,
397 U.S. 254 (1970) 9

Harllee v. City of Gulfport,
120 F.2d 41 (5th Cir. 1941) 14

Harmon v. Superior Court,
307 F.2d 796 (9th Cir. 1962) 11

Hughes v. United Eng'rs & Const'rs, Inc.,
178 F. Supp. 895 (S.D.N.Y. 1959) 17

Inland Rubber Corp. v. Triple A Tire Service, Inc.,
220 F. Supp. 490 (S.D.N.Y. 1963) 17

Joyce v. United States,
329 F. Supp. 1242 (W.D. Pa. 1971) 16

Kelly v. United States Steel Corp.,
284 F.2d 850 (3d Cir. 1960) 10, 18

Kreger v. Ryan Bros., Inc.,
308 F. Supp. 727 (W.D. Pa. 1970) 16

KVOS v. Associated Press,
299 U.S. 269 (1936) 9

Lurie Co. v. Loew's San Francisco Hotel Corp.,
315 F. Supp. 405 (N.D. Cal. 1970) 7, 16

McNutt v. General Motors Acceptance Corp.,
298 U.S. 178 (1936) 9

Murphy v. Sun Oil Co.,
86 F.2d 895 (5th Cir. 1936) 14

NLRB v. Townsend,
185 F.2d 378 (9th Cir. 1950) 14

Page

Opelika Nursing Home, Inc., v. Richardson,
448 F.2d 658 (5th Cir. 1971) 10

Pittsburgh, Cinc. & St. L. Ry. Co. v. Ramsey,
89 U.S. (22 Wall.) 322 (1875) 13, 14

Ralph Hochman & Co. v. Fort Stanwix Mfg. Co.,
284 F. Supp. 1000 (N.D.N.Y. 1968) 10

Resnik v. La Paz Guest Ranch,
289 F.2d 814 (9th Cir. 1961) 7

Sabo v. Standard Oil Co.,
295 F.2d 893 (7th Cir. 1961) 17

Saunders v. Shaw,
244 U.S. 317 (1917) 11

Schroeder v. City of New York,
371 U.S. 208 (1962) 9

Scot Typewriter Co. v. Underwood Corp.,
170 F. Supp. 862 (S.D.N.Y. 1959) 17

Shahmoon Industries, Inc., v. Imperato,
338 F.2d 449 (3d Cir. 1964) 10, 18

Stapleton v. $2,438,110,
454 F.2d 1210 (3d Cir. 1972) 14

Television Reception Corp. v. Dunbar,
426 F.2d 174 (6th Cir. 1970) 18

Topping v. Fry,
147 F.2d 715 (7th Cir. 1945) 10

United Nuclear Corp. v. Moki Oil & Rare Metals Co.,
364 F.2d 568 (10th Cir. 1966) 18

United States v. Arkansas Power and Light Co.,
165 F.2d 354 (8th Cir. 1948) 10

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Page

Unites States v. Clarke,
87 U.S. (20 Wall.) 92 (1874) 13, 14

Urbano v. Calissi,
353 F.2d 196 (3d Cir. 1965) 10

Wear-Ever Aluminum, Inc., v. Sipos,
184 F. Supp. 364 (S.D.N.Y. 1960) 17

Young v. Handwork,
179 F.2d 70 (7th Cir. 1949) 14

Constitutional and Statutory Provisions:

U.S. Const., amend. V 2, 3, 8, 12

28 U.S.C. §1254 (1) 2
§1332 . . . . . 3, 5, 15, 16, 17, 19
§1441(a) 4, 5
§1447(d) 2

Other:

1 **J. Moore, et al., Federal Practice**
¶0.60[4] at 610-11 (2d ed. 1972) 15

1 **J. Moore, et al., Federal Practice**
¶0.77 [3.-2] at 717.65 n.1 (2d ed. 1972) 17

1 **J. Moore, et al., Federal Practice**
¶0.77 [3.-3] at 717.71-72 (2d ed. 1972) 16, 17

Moore and Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited,* 77 **Harv. L. Rev.** 1426 (1964) 17

Note, 58 **Colum. L. Rev.** 1287 (1958) 17

Note, 6 **Utah L. Rev.** 231 (1958) 17

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RENTAL DEVELOPMENT CORPORATION
OF AMERICA, an Arizona corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this cause on June 28, 1972.

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OPINION BELOW

The opinion of the court of appeals, not yet reported, appears in the Appendix hereto. (A-1). No opinion was rendered by the United States District Court for the District of Arizona.[1]

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 28, 1972. A timely petition for rehearing and suggestion of appropriateness of rehearing *en banc* was denied on September 12, 1972, and this petition for a writ of certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).[2]

QUESTIONS PRESENTED

1. Whether a removed diversity case, consistently with principles of Fifth Amendment due process, can be summarily remanded to state court without the removing party's having been given an opportunity to present evidence and be heard in support of its jurisdictional assertions.

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[1] The trial court's "Opinion and Partial Judgment" (R. 3008) is in reality only a judgment, not an opinion addressed to any of the matters herein presented. ("R." refers to the record certified to the court of appeals, and "T." to the reporter's transcript of proceedings contained in that record.)

[2] Although a district court's order of remand is not reviewable except in civil-rights cases, 28 U.S.C. §1447(d), an order of a court of appeals remanding a diversity case to state court is reviewable in this Court by writ of certiorari. *Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464 (1947); *Gay v. Ruff*, 292 U.S. 25 (1934).

2. Whether a party to a diversity case, after three years of discovery, may stipulate to the existence of a jurisdictional fact, prosecute an interim appeal to the court of appeals reaffirming the contents of the stipulation as the basis for that court's jurisdiction, participate fully in a five-week trial and thereafter be allowed to avoid the effect of that stipulation.

3. Whether summary application of the "place of operations" test to an incomplete record is a lawful or proper means by which to locate a corporation's principal place of business for federal diversity purposes under 28 U.S.C. §1332(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in part that: "No person shall . . . be deprived of life, liberty or property, without due process of law . . . ."

28 U.S.C. §1332, as amended, provides in part:

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between–
>
> "(1) citizens of different states;
>
> " * * * * *
>
> "(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . ."

STATEMENT OF THE CASE

Although the sole issues presented by this petition involve federal subject-matter jurisdiction and statutory construction, the case below presented the district court with a controversy of great and sometimes confusing magnitude.

Briefly, the dispute revolved about a large apartment project and adjacent shopping center in Phoenix, Arizona, which at one time was owned by a corporation controlled by the respondents, plaintiffs below.[3] The project was sold to petitioner HBC as part of a complicated and intricate network of contractual arrangements whose nature, validity and performance were at issue. The Bialacs' principal damage claims sought more than $2.3 million in compensatory, and $1 million in punitive damages. Petitioners interposed substantial counterclaims, as to some of which they ultimately recovered judgment pursuant to stipulations entered into below.

The case was filed in the Superior Court of Arizona for Maricopa County on January 31, 1967. Petitioners timely removed the case to the United States District Court for the District of Arizona on February 3, 1967, pursuant to 28 U.S.C. §1441(a). Unopposed, the verified removal petition alleged that:

> "Petitioners at all times mentioned herein were and are citizens and residents of the State of Oregon, Harsh Building Co. and Harsh Investment Corp. at all times being corporations duly organized and existing under the laws of the State of Oregon, with their principal places of business

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[3] Respondents will hereinafter collectively be referred to as "the Bialacs," petitioner Harsh Building Co. as "HBC" and petitioner Harsh Investment Corp. as "HIC."

situated therein and outside of and other than in the State of Arizona." (R.2).

For more than three years, the parties participated actively in extensive discovery proceedings, evidenced by the more than 3000-page printed record and the transcripts of over thirty separate depositions taken throughout the United States. Voluminous pleadings went through a series of four amendments. Motions and cross-motions were filed and argued. On March 26, 1970, the parties filed an "Amended Stipulation for Pretrial Order," which provided in pertinent part:

> "This Court has jurisdiction pursuant to 28 U.S.C. Secs. 1332 and 1441 upon the diversity of citizenship of the respective parties whose corporate status and citizenship at all times material to the question of jurisdiction is as follows:
>
> * * *
>
> "(c) Harsh Building Co. and Harsh Investment Corp., Oregon corporations with the principal place of business in Oregon." (R. 2022).

Six months later, the Bialacs took an interim appeal to the Ninth Circuit from an order of the district court granting partial summary judgment to defendants.[4] The Bialacs invoked the jurisdiction of the court of appeals on grounds of diversity of citizenship with the specific assertion that HBC was an Oregon corporation whose principal place of business was in Oregon.

Trial began on May 12, 1971, more than four years after the case was introduced into the federal courts. In the final days of their case-in-chief, on June 10, 1971, the

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[4] This earlier appeal is reported as *Bialac v. Harsh Bldg. Co.*, 436 F.2d 1381 (9th Cir. 1971).

Bialacs made an oral motion to remand the case to state court for want of subject-matter jurisdiction. They argued for the first time that there was a lack of complete diversity of citizenship for the reason that the "evidence" showed HBC's principal place of business to be located within the State of Arizona, the residence of the Bialacs. (T. 2424-2425). The motion was denied. (T. 2428).[5]

Trial concluded on June 15, 1971, with the district court having granted defendants' motions for directed verdicts as to seven of the complaint's eight counts at the close of the Bialacs' case. The parties then effected stipulations regarding all other claims and counterclaims, including stipulations for the entry of judgment in favor of HBC and HIC as to several counterclaims. (R. 2972-2984).

There was thus no occasion for petitioners to present any portion of their case below. The district court held no evidentiary hearing on the jurisdictional question, and petitioners were not asked or required to submit any evidence on that question.

An appeal to the Ninth Circuit followed, with both sides filing exhaustive, extended briefs addressed primarily and in great detail to the merits of the case. On June 28, 1972, the court of appeals filed a *per curiam* opinion, which reversed the district court and ordered this case remanded to state court. The opinion appears in the appendix hereto (A-1) and contains the following language:

> "Here, the parties stipulated at the outset that one of the defendants, Harsh Building Corporation [sic], has its principal place of business in Oregon. Later the evidence showed that really the only business activity of Harsh Building

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[5] It was renewed after trial in writing (R. 2987) and again denied.

Corporation [sic] is owning and operating the Phoenix apartment complex which is the subject of this suit. Two of the plaintiffs are citizens of Arizona. Thus, we find at least one citizen of Arizona on each side of the case.

"An objection to jurisdiction based on lack of complete diversity between the parties in a lawsuit is never waived, nor is it lost by stipulation. Cf. Resnik v. La Paz Guest Ranch, 289 F.2d 814 (9th Cir. 1961). Where a corporation is engaged in only one business activity, substantially all of whose operations occur in one state, even though policy and administrative decisions are made elsewhere, the state of operations is the corporation's principal place of business. Lurie Co. v. Loew's San Francisco Hotel Corp., 315 F. Supp. 405 (N.D. Cal. 1970)."

Petitioners promptly filed a petition for rehearing and suggestion of appropriateness of rehearing *en banc*. Therein, petitioners argued, *inter alia*, that:

(1) The court of appeals' summary remand order was based upon a record containing only plaintiffs' evidence, none of which was addressed specifically to the jurisdictional issue, and effectively denied petitioners their rights to due process of law in failing to allow them the opportunity to present evidence and be heard in support of their jurisdictional claims;

(2) The court of appeals' decision was in direct, irreconcilable conflict with principles adopted by this Court, in other circuits and, indeed, within its own circuit relating to the effect of stipulation to a jurisdictional fact; and

(3) The court of appeals had based its decision upon erroneous, immaterial statements of fact.

The petition for rehearing was denied on September 12, 1972. (A-3).

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS' ABRUPT REMAND ORDER HAS DENIED TO PETITIONERS THEIR VALUABLE DUE PROCESS RIGHTS TO BE HEARD AND PRESENT EVIDENCE AS TO THE PRINCIPAL PLACE OF BUSINESS OF HBC.

At no time have petitioners been afforded an opportunity to present evidence bearing upon, and to be heard regarding, the location of HBC's principal place of business. The court of appeals ignored the most elementary concepts of Fifth Amendment due process in summarily ordering this cause remanded to state court.

The record contains only the Bialacs' evidence, which was addressed to the merits of their claims and not to the location of HBC's principal place of business. The long-unchallenged removal petition and the parties' pre-trial stipulation, combined with the district court's immediate denial of the Bialacs' motion to remand, obviated the necessity—and afforded no opportunity—for petitioners to present evidence on this now-important question. The court of appeals carelessly ignored the state of the record in entering its summary remand order on the basis of what it thought "the evidence showed."[6] In denying petitioners'

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[6] The court of appeals' misapprehension of other aspects of this case is reflected in its egregiously-mistaken statement:

> "Here, the parties stipulated at the outset that one of the defendants, Harsh Building Corporation [sic], has its principal place of business in Oregon. Later the evidence showed that really the only business activity of Harsh Building Corporation [sic] is owning and operating

(Footnote continued on next page)

request for rehearing when this fundamental error was called to its attention, the court of appeals forever shut the door to the reception of *any* evidence to support petitioners' contention that the district court properly has jurisdiction of this cause.

A party invoking federal jurisdiction has the affirmative burden of establishing the existence of that jurisdiction when it is properly challenged. *KVOS v. Associated Press*, 299 U.S. 269, 278 (1936). *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). To comport with even minimal notions of due process of law, that burden of proof requires at least the vital opportunity to be heard. When this opportunity is not given, a valuable right has been denied, as many decisions of this Court have recognized in differing contexts. See *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970); *Schroeder v. City of New York*, 371 U.S. 208, 212 (1962).

Implicit in petitioners' burden of proof on the jurisdictional issue is the requirement that they be given an opportunity to present evidence supporting their claim. They never were. A well-developed, substantial body of case law in the lower federal courts firmly supports the elementary, obvious proposition that when want of subject-matter jurisdiction is raised, the district court must conduct a factual inquiry and afford the proponent of federal

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(Footnote six continued from page eight)

> the Phoenix apartment complex which is the subject of this suit." (A-2).

The parties stipulated not "at the outset," but after three full years of discovery.

jurisdiction the opportunity to present such evidence.[7] See *Opelika Nursing Home, Inc., v. Richardson*, 448 F.2d 658 (5th Cir. 1971); *Urbano v. Calissi*, 353 F.2d 196 (3d Cir. 1965); *Arnold v. Troccoli*, 344 F.2d 842 (2d Cir. 1965); *United States v. Arkansas Power & Light Co.*, 165 F.2d 354 (8th Cir. 1948); *Topping v. Fry*, 147 F.2d 715 (7th Cir. 1945). Deprivation of this opportunity is wholly unjustifiable when the inquiry relates, as here, to the location of a corporation's "principal place of business," a question predominantly one of fact. See *Shahmoon Industries, Inc., v. Imperato*, 338 F.2d 449 (3d Cir. 1964); *Egan v. American Airlines, Inc.*, 324 F.2d 565 (2d Cir. 1963); *Kelly v. United States Steel Corp.*, 284 F.2d 850 (3d Cir. 1960).

The court of appeals' references to where HBC "has" its principal place of business and what its business activity "is" focus upon the wrong time-frame and further demonstrate the need for such a hearing. It is fundamental that diversity of citizenship must be determined as of the time federal jurisdiction is first invoked. *Brown v. Eastern States Corp.*, 181 F.2d 26 (4th Cir. 1950). There has never been an inquiry to determine what the facts were as of February, 1967, the only relevant point in time for these purposes.

The Ninth Circuit's precipitous denial of petitioners' right to present evidence on the jurisdictional issue not only flies squarely in the face of many well-considered

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[7] The limited exceptions to this rule may apply where the jurisdictional defect appears on the face of the pleadings and is irremediable, or, specifically, where a corporation's principal place of business may be a proper subject of judicial notice. See *George v. Douglas Aircraft Co.*, 332 F.2d 73 (2d Cir. 1964); *Caffery v. New York Cent. R.R.*, 324 F.2d 711 (2d Cir. 1963); *Ralph Hochman & Co. v. Fort Stanwix Mfg. Co.*, 284 F. Supp. 1000 (N.D.N.Y. 1968). This is, of course, no such case.

decisions from other circuits, but also cannot be reconciled with its own, earlier decision in *Harmon v. Superior Court*, 307 F.2d 796, 797 (9th Cir. 1962):

> "The District Court always has power to dismiss for lack of jurisdiction. It can do so at any time that such lack appears, and on its own motion. [Citations omitted]. *But it cannot dismiss for lack of jurisdiction, without giving the plaintiff an opportunity to be heard, unless such lack appears on the face of the complaint and is obviously not curable.*" (Emphasis supplied).

This Court's power to correct the court of appeals' gross error is clear from the landmark decision of *Saunders v. Shaw*, 244 U.S. 317 (1917). There, the Supreme Court of Louisiana had reversed the trial court and entered judgment for plaintiff on the basis of evidence which had been ruled inadmissible at trial and, therefore, not controverted by defendant. This Court overturned that patently-erroneous decision, noting

> "[W]hen the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here." 244 U.S. at 320.

Although the basic defect in the court of appeals' ruling is its failure, *per se*, to allow petitioners to present any evidence on the jurisdictional question, a remand to allow petitioners the chance to present such evidence would not be an empty gesture. There has never been any evidentiary inquiry whatever seeking to answer these important questions as of February, 1967: (1) What was the

"total activity" of HBC at that time? (2) To what extent did HBC's Oregon activities outshadow its Arizona operations? (3) What were the purposes and plans of the corporation? It cannot be presumed, in the absence of a hearing, that these questions would be answered in a manner to support the court of appeals' opinion.

Petitioners respectfully submit that their most basic rights to Fifth Amendment due process were summarily violated by the court of appeals' decision, which is at variance with decisions from other circuits and its own prior decisions. The ruling below cannot stand.

2. THE COURT OF APPEALS' DECISION CONFLICTS WITH RULINGS OF THIS COURT AND OTHER COURTS OF APPEALS AND IGNORES THE EFFECT OF A BINDING FACTUAL STIPULATION WHICH PROPERLY ESTABLISHED THE BASIS FOR FEDERAL JURISDICTION OVER THE CONTROVERSY BELOW.

The opinion and judgment of the court of appeals has created another head-on conflict with established federal law. The Ninth Circuit has either overlooked or ignored fundamental principles of federal jurisdiction which sustain the result reached by the district court over a case properly within its jurisdiction.

The "tragic"[8] result reached by the court of appeals is ostensibly justified by resort to an inapposite variant of the catch-phrase that a party cannot consent to federal

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[8] This is the court of appeals' own language, which is a marked understatement considering the vast waste of judicial, legal and human resources which may attend the court's cursory ruling.

jurisdiction.[9] However, the purported justification entirely misses the mark and in fact contradicts rulings of this Court and other courts of appeals. It has long been established that litigants may admit the existence of facts upon which federal jurisdiction depends, and the courts may act judicially thereon. *Pittsburgh, Cinc. & St. L. Ry. v. Ramsey*, 89 U.S. (22 Wall.) 322 (1875); *United States v. Clarke*, 87 U.S. (20 Wall.) 92 (1874). The uncontested and well-pleaded removal petition (R. 1), followed three years later by the parties' pre-trial stipulation that "at all material times" HBC was an Oregon corporation with its principal place of business in Oregon (R. 2022), provided the requisite factual basis for diversity jurisdiction, upon which the district court properly acted. The parties below have never consented to the conclusory jurisdiction of the district court. A jurisdictional fact was admitted, and the district court acted properly thereon.[10]

Abundant authority exists to support the binding effect of a factual stipulation which provides the basis for proper federal jurisdiction. The court of appeals' ruling below flies in the face of such authority, resulting in a substantial conflict among federal decisions.

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[9] In the language of the court of appeals: "An objection to jurisdiction based on lack of complete diversity between the parties in a lawsuit is never waived nor is it lost by stipulation." (A-2).

[10] The Bialacs would likely have this Court believe that *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951), is somehow in point. However, the question of the effect of a voluntary factual stipulation on a later jurisdictional challenge was not before either the Fifth Circuit or the Supreme Court in that case. No stipulation was involved. Instead, the propriety of the removal was actually litigated directly after the removal petition was acted upon, and the jurisdictional defect appeared on the face of both the state court complaint and the removal petition.

In *Pittsburgh, Cinc. & St. L. Ry. v. Ramsey, supra,* this Court stated:

> "Consent of the parties cannot give the Courts of the United States jurisdiction, but the parties may admit the existence of facts which show jurisdiction, and the courts may act judicially upon such admission." 89 U.S. (20 Wall.) at 327.

See also *United States v. Clarke, supra.* The courts of appeals which have been faced with the issue have followed suit. *Harllee v. City of Gulfport,* 120 F.2d 41, 43 (5th Cir. 1941) ("While parties cannot consent to federal jurisdiction, they may agree to facts which sustain or defeat jurisdiction."); *Murphy v. Sun Oil Co.,* 86 F.2d 895, 896 (5th Cir. 1936) ("[Plaintiff's] concession that there was the requisite diversity and amount to give jurisdiction and the Court's definite finding that there was fully and completely satisfy the most rigid requirements."); *Di Frischia v. New York Cent. R.R.,* 279 F.2d 141, 143 (3d Cir. 1960) ("Defendant's [stipulation] amounted to a striking of its defense of lack of jurisdiction and an admission of the jurisdictional facts alleged by plaintiff in his complaint."); *Young v. Handwork,* 179 F.2d 70, 72-73 (7th Cir. 1949) ("The record conclusively demonstrates . . . that the defendants admitted the facts necessary to show diversity . . . ."); *cf. Stapleton v. $2,438,110,* 454 F.2d 1210, 1218 (3d Cir. 1972).

Moreover, significant authority supporting the district court's exercise of jurisdiction exists even within the circuit below. *NLRB v. Townsend,* 185 F.2d 378, 381 (9th Cir. 1950). In fact, the Ninth Circuit has specifically relied on this Court's decisions, cited above, in stating that:

> "[I]t is well settled that one may stipulate to facts from which jurisdiction may be inferred." (Citing *Ramsey* and *Clarke, supra*). *De La Maza v.*

United States, 215 F.2d 138, 140 (9th Cir. 1954) (emphasis supplied).

The court of appeals in this case has failed to follow or consider its prior "well settled" doctrine. The opinion and result below and the above-quoted statements from the *De La Maza* court and other circuits are absolutely irreconcilable. The substantial problem created by the existence of such conflicting statements is evident—principles of federal jurisdiction form the bedrock of the federal judicial system. If they cannot be clearly and cogently applied, chaotic conditions will prevail throughout the entire federal judiciary. On the issue of the effect of the factual stipulation alone, this Court should direct a writ of certiorari to issue to the court of appeals to insure that broad working principles of jurisdiction are not "destructively"[11] applied, 1 J. Moore, et al., **Federal Practice** ¶0.60[4] at 610-11 (2d ed. 1972), in the face of a valid stipulation of jurisdictional fact.

3. THE COURT OF APPEALS' SUMMARY APPLICATION OF THE "PLACE OF OPERATIONS" TEST RAISES SIGNIFICANT QUESTIONS AS TO THE PROPER CRITERIA BY WHICH LOWER FEDERAL COURTS SHOULD LOCATE A CORPORATION'S PRINCIPAL PLACE OF BUSINESS FOR PURPOSES OF 28 U.S.C. §1332(c).

Although the primary defect in the court of appeals' ruling is its failure to grant petitioners an evidentiary

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[11] The "destructive" nature of the court of appeals' ruling below is particularly evident when it is noted that the jurisdictional objection was sprung during the closing moments of a five-week trial in a controversy which had been pending over four years in the federal system. Other courts have not been so quick to reward the concealment of such objections and have rejected tardy jurisdictional

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hearing, the court's use of the "place of operations" litmus paper to order this cause remanded to state court also raises a significant question as to what criteria should be used by the lower federal courts in locating a corporation's "principal place of business" under 28 U.S.C. §1332(c). Since the statute was amended to include this phrase in 1958, this Court has given no guidance on this important matter to litigants or to the lower courts, whose confused, conflicting views demonstrate the need for a definitive statement.

On a sketchy and fragmentary record, the court of appeals found

> "... that really the only business activity of Harsh Building Corporation [sic] is owning and operating the Phoenix apartment complex which is the subject of this suit." (A-2).

It then summarily held that

> "... Where a corporation is engaged in only one business activity, substantially all of whose operations occur in one state, even though policy and administrative decisions are made elsewhere, the state of operations is the corporation's principal place of business. Lurie Co. v. Loew's San Francisco Hotel Corp., 315 F. Supp. 405 (N.D. Cal. 1970)." (A-2).

The court of appeals thus adopted for the Ninth Circuit the "place of operations" test which has been applied by a number of district courts. See cases cited in 1 J. Moore, et

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(Footnote eleven continued from page fifteen)

objections under much less aggravated circumstances. *Di Frischia v. New York Cent. R.R.*, 279 F.2d 141, 144 (3d Cir. 1960); *Joyce v. United States*, 329 F. Supp. 1242, 1245 (W.D. Pa. 1971); *Kreger v. Ryan Bros., Inc.*, 308 F. Supp. 727, 728 (W.D. Pa. 1970).

al., **Federal Practice** ¶0.77 [3.-3] at 717.71-72 (2d ed. 1972). This test finds expression in such opinions as *Inland Rubber Corp. v. Triple A Tire Service, Inc.*, 220 F. Supp. 490, 492 (S.D.N.Y. 1963), holding that the legislative history of 28 U.S.C. §1332(c)

> "... makes it necessary to regard the locus of corporate operations as a more important factor than the locus of overall policy direction or control in determining the 'principal place of business' of a corporation."

Another line of authority, which looks to the "nerve center" of corporate activities, apparently originated in *Scot Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862 (S.D.N.Y. 1959), shortly after the 1958 amendment. It has been followed in its own Circuit, *see, e.g., Wear-Ever Aluminum, Inc., v. Sipos*, 184 F. Supp. 364 (S.D.N.Y. 1960); *Hughes v. United Eng'rs & Const'rs, Inc.*, 178 F. Supp. 895 (S.D.N.Y. 1959); in the Seventh Circuit, *Sabo v. Standard Oil Co.*, 295 F.2d 893 (7th Cir. 1961); and in a variety of district court decisions. See 1 **J. Moore, et al., Federal Practice** ¶0.77[3.-2] at 717.65 n.1 (2d ed. 1972).

Neither the "place of operations" nor the "nerve center" catch-phrases can provide a satisfactory guideline on an important issue of federal statutory application about which even the commentators cannot agree.[12] They are bromides, nothing more.

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[12] A corporation's principal place of business under 28 U.S.C. §1332(c) should be located in "the state on which the corporation most impinges, the state in which its greatest impact is felt," Moore and Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 **Harv. L. Rev.** 1426, 1444 (1964); the state "in which the corporation may be considered by the local populace to be 'at home,'" *Note*, 6 **Utah L. Rev.** 231, 242 (1958); or "that state with which it is most closely associated in the mind of the public," *Note*, 58 **Colum. L. Rev.** 1287, 1297 (1958).

A growing number of courts have followed the lead of the Third Circuit in *Kelly v. United States Steel Corp.*, 284 F.2d 850 (3d Cir. 1960), in rejecting these "tests" out of hand by engaging in a "thorough review of the total activity of the [corporation]." *Danos v. Waterford Oil Co.*, 351 F.2d 940, 942 (5th Cir. 1965). The Tenth Circuit has observed that

> "Where the corporation has its principal place of business is a question of fact to be determined by 'the character of the corporation, its purposes, the kind of business in which it is engaged, and the situs of its operations.' " *United Nuclear Corp. v. Moki Oil & Rare Metals Co.*, 364 F.2d 568, 570 (10th Cir. 1966).[13]

Use of this approach, which rejects the easy labels and tests applied in other decisions, has led the Sixth Circuit to a result almost diametrically opposed to that reached below. In *Television Reception Corp. v. Dunbar*, 426 F.2d 174, 177 (6th Cir. 1970), that court refused to find a Florida corporation's principal place of business to be located in Kentucky, even though its primary (and only revenue-producing) asset was located there, since this was only a "temporary circumstance" when considered in light of corporate purposes and activities. The court of appeals in the instant case reached a contrary conclusion and held that the principal place of business of Harsh Building Co. was in Arizona, where the court of appeals considered its

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[13] Even this line of authority occasionally strays. In *United Nuclear*, the Tenth Circuit appears to have forsaken its good intentions by opting for the "nerve center" test, while in *Kelly* and other cases, the Third Circuit appears to place undue emphasis upon the state in which the day-to-day operations of the corporation are controlled, rather than the state in which policy and executive-level decisions are made. *Cf. Shahmoon Industries, Inc., v. Imperato*, 338 F.2d 449, 452 (3rd Cir. 1964).

only operating asset to be located at *this* time. No examination whatever was made of the totality of corporate activities and purposes as they existed in February, 1967, nor was there a meaningful opportunity for any such examination on the incomplete record before the court of appeals.

This Court's lack of guidance upon a matter which is of urgent moment to litigants and lower courts and which has spawned confusing, conflicting "tests" in those lower courts is keenly felt. Petitioners respectfully submit that all such "tests" should be rejected–particularly when applied in the summary, cursory manner which characterizes the court of appeals' action below and when the application of such a test may cause a dramatic, unnecessary waste of judicial and legal effort. The time has come for this Court to examine the question of a corporation's "principal place of business" under 28 U.S.C. §1332(c) and to establish definite criteria by which that place can be located.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted.

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SAM BIALAC; JERRY BIALAC; JAMES T. BIALAC; LEE BIALAC; ALICE SUE ALTMAN; and PARK LEE ENTERPRISES, INC., an Arizona corporation,	)	
Plaintiffs-Appellants,	)	
and	)	
RENTAL DEVELOPMENT CORPORATION OF AMERICA, an Arizona corporation,	)	No. 71-2543
Additional Party Plaintiff-Appellant,	)	
vs.	)	
HARSH BUILDING CO., an Oregon corporation; HARSH INVESTMENT CORP., an Oregon corporation; HAROLD J. SCHNITZER; and HAROLD B. HUTCHINSON,	)	
Defendants-Appellees	)	

Appeal from the United States District Court for the District of Arizona

Before: CHAMBERS and WRIGHT, Circuit Judges, and PREGERSON,[1] District Judge.

PER CURIAM:

The judgment is reversed. We conclude that we must find there was a lack of diversity of citizenship. Of course,

[1] The Honorable Harry Pregerson, United States District Judge for the Central District of California, sitting by designation.

it is tragic when we come up with such a result after the case has gone through a long trial.

Here, the parties stipulated at the outset that one of the defendants, Harsh Building Corporation [sic], has its principal place of business in Oregon. Later the evidence showed that really the only business activity of Harsh Building Corporation [sic] is owning and operating the Phoenix apartment complex which is the subject of this suit. Two of the plaintiffs are citizens of Arizona. Thus, we find at least one citizen of Arizona on each side of the case.

An objection to jurisdiction based on lack of complete diversity between the parties in a lawsuit is never waived, nor is it lost by stipulation. Cf. Resnik v. La Paz Guest Ranch, 289 F.2d 814 (9th Cir. 1961). Where a corporation is engaged in only one business activity, substantially all of whose operations occur in one state, even though policy and administrative decisions are made elsewhere, the state of operations is the corporation's principal place of business. Lurie Co. v. Loew's San Francisco Hotel Corp., 315 F. Supp. 405 (N.D. Cal. 1970).

In equity there is not much to be said for sustaining the plaintiffs' (appellants') position. But jurisdiction is jurisdiction, so we must remand with directions to send the case back to the state court.

[Filed and entered on June 28, 1972]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAM BIALAC, et al.,	)	
	)	
Plaintiffs and Appellants,	)	
	)	
and	)	
	)	
RENTAL DEVELOPMENT CORPORATION OF AMERICA,	)	No. 71-2543
	)	
	)	ORDER
Additional Party Plaintiff-Appellant,	)	DENYING
	)	PETITION
vs.	)	FOR
	)	REHEAR-
HARSH BUILDING CO., an Oregon corporation, et al.,	)	ING
	)	
	)	
Defendants-Appellees.	)	
	)	

Before: CHAMBERS and WRIGHT, Circuit Judges, and PREGERSON, District Judge.

The petition for rehearing is denied. The suggestion of a rehearing en banc is rejected.

The suggestion of a rehearing en banc was passed to all active judges. None has requested a rehearing en banc.

[Filed and entered on September 12, 1972]

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-602

HARSH BUILDING CO., an Oregon corporation;
HARSH INVESTMENT CORP., an Oregon corporation;
HAROLD J. SCHNITZER;
and HAROLD B. HUTCHINSON,

Petitioners,

v.

SAM BIALAC; JERRY BIALAC;
JAMES T. BLALAC; LEE BIALAC;
ALICE SUE ALTMAN; PARK LEE ENTERPRISES, INC.,
an Arizona corporation; and
RENTAL DEVELOPMENT CORPORATION
OF AMERICA, an Arizona corporation,

Respondents.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

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No. 72-602

HARSH BUILDING CO., an Oregon corporation;
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MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statutory Provision Involved	2
Statement of the Case	2
Argument	3
Conclusion	5

CITATIONS

Cases: *Page*

Aetna Cas. & Sur. Co. v. Flowers, 330 U.S. 464, 67 S. Ct. 798, 91 L. Ed. 1024 (1947) 2

American Fire & Cas. Co. v. Finn, 341 U.S. 6, 71 S. Ct. 534, 95 L. Ed. 702 (1951) 4

Bialac v. Harsh Building Co., 463 F.2d 1185 (9th Cir. 1972) 1

Bruner v. Marjec, Inc., 250 F. Supp. 426 (W.D. Va. 1966) 5

Bullock v. Wiebe Constr. Co., 241 F. Supp. 961 (S.D. Iowa 1965) 5

Carson v. Dunham, 121 U.S. 421, 7 S. Ct. 1030, 30 L. Ed. 992 (1887) 4

Hodges v. Georgia Kaolin Co., 207 F. Supp. 374 (M.D. Ga. 1962) 5

Lurie Co. v. Loew's San Francisco Hotel Corp., 315 F. Supp. 405 (N.D. Cal. 1970) 5

Spector v. Rex Sierra Gold Corp., 227 F. Supp. 550 (S.D.N.Y. 1964) 5

Statutory Provisions:

28 U.S.C. § 1254 2

28 U.S.C. § 1332 2

28 U.S.C. § 1447 3

Other:

ALI Study of the Division of Jurisdiction Between State and Federal Courts (1969) 4

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MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINION BELOW

The opinion of the court below is attached to the petition and reported as *Bialac v. Harsh Building Co.*, 463 F.2d 1185 (1972).

JURISDICTION

This was a state case removed on a claim of diversity. The Court of Appeals found no diversity and ordered remand, and this jurisdictional ruling is the matter disputed here. This Court has jurisdiction to review that question, 28 U.S.C. § 1254(1); *Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 467, 67 S. Ct. 798, 91 L. Ed. 1024 (1947).

QUESTION PRESENTED

Where a diverse principal place of business was admitted at the time of removal, but challenged before the end of plaintiffs' case, under what circumstances may remand be ordered?

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1332(a) provides jurisdiction in cases between citizens of different states and further provides:

> "(c) . . . a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . ."

STATEMENT OF THE CASE

This is a contract case involving the development and sale of a condominium project and shopping center in Phoenix, Arizona. Plaintiffs, respondents here, are residents of Arizona and California. The two key defendant corporations are both incorporated in Oregon. The defendants caused the case to be removed to the federal district court in Arizona from the Arizona state court, alleging that the two corporations not merely were incorporated in Oregon but had their principal place of business there.

In truth, Harsh Building Co. (HBC), one of the Oregon corporations, did in fact have no business at all, other than corporate housekeeping, except in Phoenix, Arizona, where it was entirely engaged in the condominium project and sales program. While the plaintiffs did stipulate prior to trial that the principal place

of business was in Oregon, facts to the contrary were developed at trial. Accordingly, before the plaintiffs had rested they objected to the jurisdiction on the grounds that there was no diversity.

The trial court considered the matter, found that it had jurisdiction, and directed a verdict on the merits for the defendants. The Court of Appeals reversed, finding that "the evidence showed that really the only business activity of Harsh Building Corporation [HBC] is owning and operating the Phoenix apartment complex which is the subject of this suit." It therefore applied the view that where all business activity is in one state, that state will be regarded as the principal place of business for diversity purposes, and ordered the remand. A petition for rehearing *en banc* was denied, the order noting that "[t]he suggestion of a rehearing en banc was passed to all active judges. None has requested a rehearing en banc." This petition followed.

ARGUMENT

The petition should be denied.

1. The first claimed error is that the decision of the Court of Appeals is based on the record as it stood at the end of the plantiffs' case, and that the defendants therefore were denied due process in that they were not permitted to "present evidence as to the principal place of business of HBC."

The facts were thoroughly considered at the trial court level by the trial judge before he made his own ruling. In the Court of Appeals the petitioners contended that the jurisdiction was sustained not merely by the stipulation but that it was "supported by other facts in the record." Petitioners asked no opportunity to make a further factual presentation in the district court and, in fact, successfully resisted respondents' attempt to do so (R. 2989, 3065). Moreover, petitioners do not at the present time name one single fact which they would offer to show error by the Court of Appeals. Under the remand statute, 28 U.S.C. § 1447, remand "shall" be made by the district court when "at any time before

final judgment it appears that the case was removed improvidently," and the burden of justifying the jurisdiction is upon the removing party; *Carson v. Dunham*, 121 U.S. 421, 7 S. Ct. 1030, 30 L. Ed. 992 (1887). Certainly petitioners' opposition to an evidentiary hearing in the district court and their failure to identify any fact they were deprived of showing, renders hollow their complaint as to the time and manner of decision.

2. Petitioners contend that the parties may stipulate to the jurisdiction of a district court by admitting facts on which it depends, and that having made such a stipulation, they cannot backtrack from it when further facts are available. The opposite was decided in *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 71 S. Ct. 534, 95 L. Ed. 702 (1951), except that in *Finn*, the question of jurisdiction was raised for the first time in the Court of Appeals, and by the party which had made the removal at that. Here the matter was raised before the end of the trial, and by the party which had been removed.

All of the policy arguments offered by petitioners have force. See in this connection the American Law Institute proposed revision of the judicial code, section 1386, which would modify *Finn* and enlarge the possibility of waiver of objections to federal jurisdiction. Even under that modification, "a party who has challenged the jurisdiction in the district court may raise the question on appeal"; see *ALI Study of the Division of Jurisdiction Between State and Federal Courts* 372 (1969). Here the respondents did make the challenge.

Perhaps Congress will be persuaded to modify the traditional rule; it may adopt section 1386. On the other hand, perhaps the desire to confine the federal jurisdiction may cause it to adhere to the traditional hard line against waiver. Nothing in the instant case calls upon this Court to anticipate the Congress and to junk its own precedents.

3. The petitioners contend that the court below should not have applied the "place of operations" test of principal place of business. No conflict is very seriously adduced on this point, but rather cases are suggested each of which depends on its peculiar facts. The rule is overwhelming that where a corporation is incorporated in state *A* and keeps its corporate records there but does all its actual business in state *B*, the principal place of business is state *B*. *See, e.g., Lurie Co. v. Loew's San Francisco Hotel Corp.*, 315 F. Supp. 405 (N.D. Cal. 1970); *Bruner v. Marjec, Inc.*, 250 F. Supp. 426 (W.D. Va. 1966); *Bullock v. Wiebe Constr. Co.*, 241 F. Supp. 961 (S.D. Iowa 1965); *Spector v. Rex Sierra Gold Corp.*, 227 F. Supp. 550 (S.D.N.Y. 1964); and *Hodges v. Georgia Kaolin Co.*, 207 F. Supp. 374 (M.D. Ga. 1962).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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November, 1972.

FILE COPY

FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-602

HARSH BUILDING CO., *et al.*, *Petitioners*,

v.

SAM BIALAC, *et al.*, *Respondents*.

On Petition for a Writ of Certiorari
To the United States
Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING

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INDEX

Page

I. Respondents have misled the Court in suggesting that they first became aware at trial of the "facts" underlying their jurisdictional objections 2

II. The record below is not, as Respondents assert, devoid of evidence which supports Petitioners' request for an evidentiary hearing to determine HBC's principal place of business 3

CONCLUSION 5

AUTHORITIES CITED

Cases:

DiFrischia v. New York Cent. R.R., 279 F.2d 141, 144 (3d Cir. 1960) 3

Television Reception Corp. v. Dunbar, 426 F.2d 174, 177 (6th Cir. 1970) 5

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Respondents.

On Petition for a Writ of Certiorari
To the United States
Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING

Petitioners herein respectfully move this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on December 11, 1972, and (2) granting the petition. As grounds for this motion, petitioner states the following:

I. RESPONDENTS HAVE MISLED THE COURT IN SUGGESTING THAT THEY FIRST BECAME AWARE AT TRIAL OF THE "FACTS" UNDERLYING THEIR JURISDICTIONAL OBJECTIONS.

In their Memorandum in Opposition, the Bialacs state:

> "While the plaintiffs did stipulate prior to trial that the principal place of business [of HBC] was in Oregon, *facts to the contrary were developed at trial.* Accordingly, before the plaintiffs had rested they objected to the jurisdiction on the grounds that there was no diversity." (At pp. 2-3) (Emphasis supplied).

By this characterization of events below, the Bialacs have implied that they first became aware of the facts underlying their jurisdictional objections during trial. The inference is pernicious, unsupported in the record and grossly misleading.

The Bialacs knew during negotiations for sale of the apartment project that HBC was to be a "shell" corporation whose only initial asset, in addition to its capitalization, would be the project. (T. 1253, testimony of William Chertok, attorney for the Bialac interests). Indeed, Jerry Bialac so informed Harold J. Schnitzer, later president of HBC, during their initial discussions. (T. 79-80). The Bialacs were also aware at an early date that the FHA regulatory agreement signed by HBC in 1965 (Ex. 14) precluded any other business activity. (See Brief of Appellants, filed in the court of appeals, at 21). Significantly, the Bialacs have not pointed to any item of evidence introduced at trial which, for the first time, suddenly and serendipitously revealed to them facts which gave rise to their jurisdictional objections.

It is in light of this true state of affairs that the court of appeals' action below conflicts dramatically and directly with other lower court decisions which have refused to allow litigants to long conceal jurisdictional objections, springing the trap at the last moment. See, *e.g.*, *DiFrischia v. New York Cent. R.R.*, 279 F.2d 141, 144 (3d Cir. 1960). The court of appeals was under the same misapprehension that was fostered by the Bialacs in their Memorandum in Opposition filed in this Court – that their stipulation as to HBC's principal place of business was followed by the discovery of later evidence to the contrary.

This substantial mischaracterization of the record should not be countenanced. The denial of certiorari should be reconsidered and the jurisdictional issue resolved on the merits.

II. THE RECORD BELOW IS NOT, AS RESPONDENTS ASSERT, DEVOID OF EVIDENCE WHICH SUPPORTS PETITIONERS' REQUEST FOR AN EVIDENTIARY HEARING TO DETERMINE HBC's PRINCIPAL PLACE OF BUSINESS.

In their Memorandum in Opposition, the Bialacs seek to justify the court of appeals' summary remand by arguing that

> " . . . petitioners do not at the present time name one single fact which they would offer to show error by the Court of Appeals [in failing to provide for an evidentiary hearing on HBC's principal place of business]." (At 3).

Putting aside for a moment the obvious rejoinder – that the record below, because of the directed verdicts, consists

only of the Bialacs' evidence – petitioners would dispel the unwarranted suggestion that their position is wholly without support in the record.

During the cross-examination of Jerry Bialac, the following colloquy occurred regarding his trips outside the state of Arizona on behalf of HBC:

> "Q. Now, in January of 1966, did you go to Jacksonville, Florida?
>
> "A. Yes, sir . . .
>
> "Q. Did Harsh Building Company have any business in Jacksonville, Florida?
>
> "A. Mr. Schnitzer asked me to look at a project in Jacksonville that we might be jointly interested in.
>
> "Q. What project was that?
>
> "A. That was an FHA high-rise apartments (sic) that we were thinking of going in together and making the same type of 234 condominium . . . . " (T. 635).

The quoted testimony suggests that HBC's corporate plans and objectives were not necessarily limited to the state of Arizona. Petitioners cannot prove more by reference to the trial record, because there was no opportunity for them to contribute evidence of their own to that record.

Yet, the Bialacs' own testimony shows that an evidentiary inquiry into the "total activity" of HBC at the date of removal of this cause would not be fruitless. The entitlement to such a hearing under even minimal concepts of "due process of law" is clear (petition at 8-12). The district court should hear evidence as to whether the location of HBC's only revenue-producing asset in Arizona was

a mere "temporary circumstance," when considered in light of its corporate purposes and other activities. Cf. *Television Reception Corp. v. Dunbar*, 426 F.2d 174, 177 (6th Cir. 1970). Reconsideration by this Court of its denial of certiorari, a grant of certiorari, and a limited remand for an evidentiary hearing would give petitioners the day in court which they have never had upon the factual question of HBC's principal place of business.

CONCLUSION

For the foregoing reasons, as well as those contained in the petition for writ of certiorari, petitioners pray that the Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

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